No. 17-6086

IN THE

Supreme Court of the United States

HERMAN AVERY GUNDY,

PETITIONER,

v.

UNITED STATES OF AMERICA,

RESPONDENT.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE CATO INSTITUTE AND CAUSE OF ACTION INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Does granting the attorney general unbounded discretion to define federal criminal liability violate the nondelegation doctrine?

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INTEREST OF THE *AMICI CURIAE*[1]

The Cato Institute is a nonpartisan public-policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established to restore the principles of constitutional government that are the foundation of liberty. To these ends, Cato conducts conferences and publishes books, studies, and the annual *Cato Supreme Court Review*.

Cause of Action Institute is a nonprofit, nonpartisan government oversight organization that uses investigative, legal, and communications tools to educate the public on how government accountability, transparency, and the rule of law protect liberty and economic opportunity. As part of this mission, it works to expose and prevent government and agency misuse of power by appearing as *amicus curiae* in federal court. *See, e.g.*, *McCutcheon v. FEC*, 134 S. Ct. 1434, 1460 (2014) (citing CoA Institute's *amicus* brief).

This case interests *amici* because individual liberty is best preserved by a constitutionally constrained executive branch, consistent with the Framer's design. Specific to this case, *amici* also have an interest in challenging government overreach in the criminal-justice system, protecting the rule of law, and working to combat "overcriminalization."

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[1] Rule 37 statement: All parties received timely notice of intent to file this brief and consented to its filing. No counsel for any party authored any part of this brief and no person or entity other than *amici* funded its preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

Imagine that Congress passed the following law:

SECTION 1: It shall be a criminal offense to behave on federal property in a manner annoying to persons passing by.

SECTION 2: The Attorney General shall have power to specify what behavior is annoying.

This Court has already determined that the operative language of the hypothetical Section 1 is unconstitutionally vague because it subjects citizens to an "unascertainable standard." *See Coates v. Cincinnati*, 402 U.S. 611, 614 (1971). But does adding Section 2 rehabilitate the law? The failure to enforce the nondelegation doctrine has thus undermined this Court's efforts against legislative vagueness. Is it any comfort to a defendant that the standard against which he is judged was devised not by the constable arresting him but by the nation's chief constable?

That's this case. Herman Gundy was punished for violating a law that no legislature enacted. He now stands convicted of a crime based on the attorney general's whim. Few insults to the principles of a free society could be greater. Our system of separated powers means, at the very least, that the powers must remain separate. This is not some mere appeal to procedural formality, but a guarantee of our rights as citizens.

The Vesting Clauses in the Constitution's first three articles establish a tripartite government of divided authority. While these may overlap at the margins, each branch retains a core set of powers such that it may check and balance the others. To permit delegation from one to another—for purported efficiency

gains—undermines that original design. After all, why should Congress deliberate, make judgments, and stand accountable for each determination when it can license the executive to apply purportedly greater wisdom or technocratic expertise? *Pace* Woodrow Wilson, that's not how this works.

Here, maybe sex-offense registries should record every past offender, or maybe they should record only offenses of the worst severity, or maybe they should look to aspects of a crime indicative of the risk of recidivism. Each of these is a coherent policy choice, but the Sex Offender Registration and Notification Act (SORNA) offers no pretense of making that policy choice. Instead it punts, assigning to the executive sole and unmoored discretion to determine the answer based on no principle, intelligible or otherwise. Such broad, delegated discretion is at odds with the promise of our founding document, which sought to prevent the "gradual concentration of the several powers in the same department." The Federalist No. 51 (Madison).

These concerns are not an embrace of formalism for its own sake, but the foundation of the rule of law, which requires that prosecutorial authority be cabined within strictures defined by the people's representatives. *Ad hoc* adjudication may have been sufficient for King Solomon, *see* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1176 (1989), but neither authority nor wisdom is divinely granted to the executive under our Constitution. The division of legislative and enforcement authority thus limits each, ensuring that citizens have notice of the laws they must follow, accountability from those who make them, and assurance that their legal duties won't fluctuate at an official's caprice.

These concerns for the separation of powers, and ultimately the rule of law, are most acute where they implicate personal liberty. While the Court has allowed broad discretion when determining, say, the safe level of a hazardous chemical, criminal liability is different. Administering criminal law is a core function of the government, but it's equally important that criminal law be constrained within constitutional bounds. Indeed, two constitutional provisions, the Ex Post Facto Clause and the Bill of Attainder Clause, indicate our system's particular concern with preventing abuses of criminal law. Those concerns were important enough that the Framers' applied the provisions to both the federal and state governments. U.S. Const. art. I, §§ 9, 10. Criminal proscriptions must be clear and discernable, not subject to the vagaries of executive discretion. The delegation of authority to the attorney general thus represents a fundamental threat to constitutional design, eliding the line between making and enforcing criminal law.

When "the right both of making and of enforcing the laws . . . are united together, there can be no public liberty." 1 W. Blackstone, *Commentaries on the Laws of England* 142 (1765). Indeed, the Declaration of Independence denounced the king's "Arbitrary government" and "pretended offenses." A century after the Constitution aimed to prevent such tyranny, the Court said: "That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution." *Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892).

The Court should again check the unlawful delegation of congressional responsibility and reaffirm John

Adams's proscription that "[t]he executive shall never exercise the legislative and judicial powers . . . to the end it may be a government of laws and not of men." Mass Const. pt. 1, art. XXX. Constitutional structure exists to protect each of us, and so we must protect it.

ARGUMENT

I. ENFORCING THE NONDELEGATION DOCTRINE IS ESSENTIAL TO PRESERVING CONSTITUTIONAL STRUCTURE

A. The Vesting Clauses Establish Separate Spheres of Authority

"The nondelegation doctrine is rooted in the principle of separation of powers that underlies our tripartite system of Government." *Mistretta v. United States*, 488 U.S. 361, 371 (1989). Article I states that "[a]ll legislative Powers herein granted shall be vested in a Congress." U.S. Const. art. I, § 1. In conjunction with the vesting clauses that open Articles II and III, the Article I Vesting Clause sets the core design of our constitutional structure. This is not a disposable organizational chart. Instead, the Framers laid out separate spheres of authority because "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many . . . may justly be pronounced the very definition of tyranny." The Federalist No. 47 (Madison). Recognizing this, they set out to divide and conquer the ambition of any tyrant, making each branch answerable to the others, since "[a]mbition must be made to counteract ambition." The Federalist No. 51 (Madison).

Intrinsic to this approach to governance is the recognition that no branch may delegate its assigned

sphere to any other. Without that principle, the structure itself would be a nullity. Gary Lawson, *Delegation and Original Meaning*, 88 Va. L. Rev. 327, 340 (2002) ("The Vesting Clauses, and indeed the entire structure of the Constitution, make no sense [if there is no limit on delegations]."). This point is not new. In the Second Congress, legislators rejected an amendment which would have granted the president the power to determine postal routes. *Id.* at 402. One representative, with a bit of cheek, announced that if that amendment passed he would "make one which will save a deal of time and money, by making a short session of it; for if this House can, with propriety, leave the business of the post office to the President, it may leave to him any other business of legislation." 3 Annals of Cong. 223 (1791). Considering a grant of authority to the judiciary, Chief Justice Marshall declared some years later that "[i]t will not be contended that Congress can delegate to the courts, or to any other tribunals, powers which are strictly and exclusively legislative." *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42–43 (1825).

Excessive delegation creates other mischief too. "Delegation undermines separation of powers, not only by expanding the power of executive agencies, but also by unraveling the institutional interests of Congress." Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. Rev. 1463, 1465 (2015). The result is a legislature whose members are less accountable both to their constituents and to each other. It discharges them from the duty to come together as a deliberative body to legislate on even the most pressing matters. *Id.* Under this framework, Congress need not shoulder the responsibilities for the policies they've enabled, instead retaining plausible deniability as the executive confronts the

hard questions of governing. *See* Morris P. Fiorina, *Group Concentration and the Delegation of Legislative Authority*, in *Regulatory Policy and the Social Sciences* 175, 187 (Roger G. Noll ed., 1985). In place of a clash of ambitions, "[l]awmakers may prefer to collude, rather than compete, with executive agencies over administrative power and so the Madisonian checks and balances will not prevent excessive delegations." Rao, *supra*, at 1466.

Recognizing these concerns, the Court has a long-developed doctrine limiting Congress's discretion to delegate its legislative prerogatives. As Justice Rehnquist explained:

> First, and most abstractly, [the nondelegation doctrine] ensures to the extent consistent with orderly governmental administration that important choices of social policy are made by Congress, the branch of our Government most responsive to the popular will. Second, the doctrine guarantees that, to the extent Congress finds it necessary to delegate authority, it provides the recipient of that authority with an "intelligible principle" to guide the exercise of the delegated discretion. Third, and derivative of the second, the doctrine ensures that courts charged with reviewing the exercise of delegated legislative discretion will be able to test that exercise against ascertainable standards.

Indus. Union Dep't, AFL-CIO v. API, 448 U.S. 607, 685–86 (1980) (Rehnquist, J., concurring) (internal citation omitted).

Here, it may have been a valid policy choice for Congress to have prescribed registration for pre-

SORNA offenses as for post-SORNA offenses. But Congress declined to do so. Instead it passed this duty to another branch to make the determination, with no indication of how it was to be made. The nondelegation doctrine prohibits this abrogation of responsibility. *See, e.g., Dep't of Transp. v. Ass'n of Am. R.R.*, 135 S. Ct. 1225, 1244 (2015) (Thomas, J., concurring) ("[T]he separation of powers is, in part, what supports our enduring conviction that the Vesting Clauses are exclusive and that the branch in which a power is vested may not give it up or otherwise reallocate it.").

B. Concerns About Indeterminate Standards Should Not Be Allowed to Undermine Basic Constitutional Structure

This Court has often been hesitant to overturn legislative grants of discretion to the executive. This reluctance comes in part from the inherent difficulty of drawing clean lines between different branches' prerogatives. *See Mistretta*, 488 U.S. at 415 (Scalia, J., dissenting) ("[N]o statute can be entirely precise, and that some judgments, even some judgments involving policy considerations, must be left to the officers executing the law and to the judges applying it, the debate over unconstitutional delegation becomes a debate not over a point of principle but over a question of degree."). Chief Justice Marshall recognized this even as he expounded the importance of the principle. *Wayman*, 23 U.S. at 43 ("The line has not been exactly drawn which separates those important subjects").

Yet "the inherent difficulty of line-drawing is no excuse for not enforcing the Constitution." *Ass'n of Am. R.R.*, 135 S. Ct. at 1237 (Alito, J., concurring). The Court's hesitation to police the constitutional boundary has allowed legislative delegations to metastasize,

such that today "the citizen confronting thousands of pages of regulations—promulgated by an agency directed by Congress to regulate, say, 'in the public interest'—can perhaps be excused for thinking that it is the agency really doing the legislating." *Id.* (quoting *Arlington* v. *FCC*, 133 S. Ct. 1863, 1879 (2013) (Roberts, C.J., dissenting)).

Yet the Court does not decline to enforce other constitutional protections due to line-drawing problems. What, exactly, constitutes an "undue burden" on the right of a woman to choose an abortion? *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). How does one distinguish between "conduct" and "speech?" *Wisconsin v. Mitchell*, 508 U.S. 476 (1993). What is a sufficiently "substantial" relation to a sufficiently "important" government interest when assessing distinctions on the basis of sex? *Craig v. Boren*, 429 U.S. 190 (1976). When is a search "reasonable?" *Whren v. United States*, 517 U.S. 806 (1996). These questions are not self-answering. Yet the Court has answered them in case after case—and lower courts have also weighed in. The accretion of common-law wisdom has created doctrines that can now be applied and continually refined through that application. The paucity of guidance and clarity on the nondelegation doctrine is simply a function of this Court's skittishness in giving it shape. And a deficit that only this Court can remedy.

"[T]he Constitution has never been regarded as denying to Congress the necessary resources of flexibility and practicality." *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529 (1935). Indeed, the Court has often walked with a light step while treading on Congress's judgment. *See, e.g. N.Y. Cent. Sec. Corp. v. United States*, 287 U.S. 12, 25 (1932) (holding

that regulating in the "public interest" was "not a concept without ascertainable criteria"). But "the constant recognition of the necessity and validity of such provisions, and the wide range of administrative authority which has been developed by means of them, cannot be allowed to obscure the limitations of the authority to delegate, if our constitutional system is to be maintained." *Schechter Poultry*, 295 U.S. at 530.

Nondelegation principles "do not prevent Congress from obtaining the assistance of its coordinate Branches," *Mistretta*, 488 U.S. at 372 (1989), and few doubt "the inherent necessities of government coordination." *J. W. Hampton, Jr., & Co.* v. *United States*, 276 U.S. 394, 406 (1928). But obtaining necessary assistance does not license the avoidance of difficult questions. Congress's rulemaking authority, as ratified by this Court, does not come from Congress's being "too busy or too divided and can therefore assign its responsibility of making law to someone else." *Mistretta*, 488 U.S. at 416 (Scalia, J., dissenting).

To the extent humility is warranted, it is in those areas where "the field is sufficiently technical, the ground to be covered sufficiently large, and the Members of Congress themselves not necessarily expert in the area in which they choose to legislate" such that it makes sense that "Congress lay down the general policy and standards that animate the law, leaving the agency to refine those standards" *Indus. Union*, 448 U.S. at 675 (Rehnquist, J., concurring). This is also not a license for the legislature to forego its responsibility of informing itself about the subjects upon which it is prepared to declare new law. But whatever the legislature's limitations when determining the safe level of carcinogens, they are of no moment in the context of

SORNA. This statute illustrates in detail the conduct and categories that Congress wished to address, only punting on the question of pre-SORNA conduct. But defining pre-SORNA conduct does not require analyzing complex chemical compositions or reference to statistical regressions. Deciding which prior crimes warrant registration is no more complex a question than which future crimes warrant the same. Yet Congress could not come to an agreement on the matter. If Congress cannot resolve to define a legal prescription to govern the conduct of citizens, *amici* submit that there can be no valid prescription at all.

This Court's cases ask whether SORNA "furnishes a declaration of policy or a standard of action." *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 416 (1935). It is entirely within Congress's power to "establish primary standards, devolving upon others the duty to carry out the declared legislative policy." *Id.* at 426. But there is no primary standard here, nor a secondary or tertiary one. The statute simply provides that "the Attorney General shall have authority to specify the applicability of the requirements of this subchapter." 34 U.S.C. § 20913(d). He may require sex offenders to register based on the severity of their crime, the time since their conviction, or at random based on the first letter of their last names. He may consult the laws of the various states or various astrological charts.[2] SORNA grants him "an unlimited authority to determine the policy and to lay down the prohibition, or not to lay it down, as he may see fit. And disobedience to his order is made a crime punishable by fine and imprisonment." *Panama Ref.*, 293 U.S. at 416.

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[2] Some such decisions or actions may violate due process, but that would still be the case if Congress were taking them itself.

Even those cases that suggest a more solicitous deference toward delegation acknowledge that a statute cannot survive if there is "an absence of standards for the guidance of the Administrator's action, so that it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed." *Yakus v. United States*, 321 U.S. 414, 426 (1944). That is this case. The statute delegates to the executive standardless discretion to define the set of prior offenders to whom SORNA applies. The "will of Congress" cannot be discerned from a standard Congress did not write.

Moreover, the Court has emphasized that it is of no moment whether the choice the executive makes could be defended on its own terms as sound or restrained: "The idea that an agency can cure an unconstitutionally standardless delegation of power by declining to exercise some of that power seems to us internally contradictory." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 473 (2001). The question is whether the statute, on its face, is an impermissible delegation, not whether the path chosen travels too far afield, because "[t]he very choice of which portion of the power to exercise—that is to say, the prescription of the standard that Congress had omitted—would *itself* be an exercise of the forbidden legislative authority." *Id.*

If the delegation here is to be allowed, what would remain of the nondelegation doctrine and the protections to liberty it affords? Could Congress outlaw "all transactions in interstate commerce that fail to promote goodness and niceness," and leave it to the secretary of commerce to determine the details? Lawson, *supra*, at 340. As an English sentence, that statute is "not literally gibberish," *id.*, and *amici* do not suggest

the secretary would seek to do his duty with anything but honor. Yet what is left, at that point, of the separation of powers? Indeed, what are we left with but a philosopher king of commerce?[3] Before one objects to this theater of the absurd, notice that Professor Lawson's hyperbole provides more notice, more guidance, and more intelligibility than Congress provided in SORNA. At least his hypothetical secretary is obliged to encourage citizens to be good and nice.

The Court has struck down two legislative delegations, "one of which provided literally no guidance for the exercise of discretion, and the other of which conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring 'fair competition.'" *Whitman*, 531 U.S. at 474. So petitioner is in luck, because here again the statute provides no guidance in the most literal sense. Reversing the decision below would not be a bold new journey where no court has gone before, but a reassertion of the most basic outer bounds of delegable authority. Affirming it would further consign the doctrine to desuetude.

II. THE STRUCTURAL PROTECTIONS PRESERVED BY THE NONDELEGATION DOCTRINE ARE FUNDAMENTAL TO THE RULE OF LAW

A. The Rule of Law Requires a Separation of Law-Making and Law-Executing

The separation-of-powers concerns raised by SORNA's delegation are a primary component of the

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[3] True, it's a philosopher king who must go through notice and comment rulemaking—perhaps. *See generally Auer v. Robbins*, 519 U.S. 452 (1997).

rule of law itself. Separation of powers does not merely divvy up of responsibly for the sake of efficiency but guarantees that each of us will be accountable to a sovereign who remains accountable to the people. That sovereign can deprive us of our liberty only by adhering to standards laid down in advance.

"There can be no liberty where the legislative and executive powers are united in the same person." The Federalist No. 47 (Madison) (quoting Montesquieu). The reason is that "apprehensions may arise, lest the same monarch or senate that makes tyrannical laws will execute them tyrannically." Michael B. Rappaport, *The Selective Nondelegation Doctrine and the Line Item Veto: A New Approach to the Nondelegation Doctrine and Its Implications for Clinton v. City of New York*, 76 Tul. L. Rev. 265, 307 (2001) (cleaned up).

Locke elaborated on the same sentiment:

> It may be too great a temptation to human frailty, apt to grasp at power, for the same persons, who have the power of making laws, to have also in their hands the power to execute them, whereby they may exempt themselves from obedience to the laws they make, and suit the law, both in its making and execution, to their own private advantage.

Id. (quoting John Locke, *The Second Treatise of Government* 73 (J.W. Gough ed., Basil Blackwell 3d ed. 1976) (1690)). If men were angels, such internal division and controls would not be necessary, but in "framing a government which is to be administered by men over men . . . you must first enable the government to control the governed; and in the next place oblige it to control itself." The Federalist No. 51 (Madison). The

Framers built the federal system to prevent the accrual of too much power in any one hand.

Separating the spheres of authority limits the discretion of each sphere. The lawmaker determines a sound rule and writes it down for all to examine; the law-enforcer independently takes that rule and finds those who don't adhere to it; and the law-adjudicator independently confirms that the rule was followed and is consistent with the larger body of rules. No one of the three may abridge the liberty of a citizen without the consent of the other two. The citizen is shielded from the political convenience of the legislator, the personal vendetta of the policeman or prosecutor, and the idiosyncrasy of the judge.

When the separation of powers is eroded, those protections break down. The prosecutor can charge people for crimes and infractions never contemplated by the legislature, the representatives of the people. An unconstrained judge can rule against those he dislikes. When legislatures act as judge and prosecutor it violates the Bill of Attainder Clause. U.S. Const. art. I, § 9, cl. 3. And when the prosecutor writes the laws he will seek to enforce, the best solution is often for judges to decline to approve such overreach, as here.

This Court recently reaffirmed a parallel principle of federalism: "By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power. When government acts in excess of lawful powers, that liberty is at stake." *Bond v. United States*, 564 U.S. 211, 221–22 (2011) (cleaned up). As with the division of power between the states and the federal government, the division of power between the coordinate branches protects individual liberty, not

simply the prerogatives of the branches themselves. Where this Court fails to enforce these divisions, liberty is imperiled, as was the case in some shameful episodes in the nation's history. *See, e.g., Hirabayashi v. United States*, 320 U.S. 81, 104 (1943) (approving the delegation of authority to military commanders to intern citizens of Japanese descent).

SORNA "purports to authorize the [attorney general] to pass a prohibitory law." *Panama Ref.* 293 U.S. at 414. It is that regulation—not the statute—that criminalizes Gundy's failure to register. Blackstone "defined a 'law' as a generally applicable 'rule of civil conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong.'" *Ass'n of Am. R.R.*, 135 S. Ct. at 1244 (Thomas, J., concurring). He defined a tyranny as the ability to both make and enforce those rules. *Id.* While upholding Gundy's conviction would not march our system into tyranny, it would move us one step further down a road we should not be on.

B. Undermining the Rule of Law Is Most Dangerous When Criminal Liability Is at Issue

Mr. Gundy stands convicted of failing to heed a rule that cannot be found in any law passed by Congress. Instead, his criminality was determined by the attorney general alone. It is precisely this context in which the Court must exercise its highest vigilance, because criminal liability has such an awesome impact on the exercise of individual rights and freedoms.

The imposition of criminal sanction by executive fiat is one of the tyrannies the Founders most feared. They weren't drafting grievances against King George

III for improperly specifying ozone standards. Commentators as far back as Lord Coke affirmed that the king could not "change any part of the common law, nor create any offence by his proclamation, which was not an offence before, without Parliament." *Ass'n of Am. R.R.*, 135 S. Ct. at 1243 (Thomas, J., concurring) (citing *Case of Proclamations*, 12 Co. Rep. 74, 75, 77 Eng. Rep. 1352, 1353 (K.B. 1611)).

This Court has long imposed stringent review on criminal prohibitions due to the abusive potential of executive discretion. It has struck down laws that fail to articulate standards for criminal liability. *See, e.g., Johnson v. United States*, 135 S. Ct. 2551 (2015). Even when standards are otherwise permissible, the Court interprets them on the side of lenity. *See, e.g., United States v. Santos*, 553 U.S. 507, 514 (2008). Most recently, in a case striking down a vague immigration law, Justice Gorsuch opined that "[v]ague laws invite arbitrary power." *Sessions v. Dimaya*, 138 S. Ct. 1204, 1223 (2018) (Gorsuch, J., concurring). If vaguely written laws can't survive, then surely laws that don't exist should receive no better treatment. No law is vaguer than one that leaves a blank and directs executive officers to fill it in.

In addition to striking down vague laws, the Court consistently cabins prosecutorial authority by adopting limiting interpretations of broad statutes. Twice in the past four years, the Court has considered the Justice Department's creative readings of Title 18, and twice it has pulled the U.S. Code back from the brink of absurdity. *See Yates v. United States*, 135 S. Ct. 1074 (2015); *Bond v. United States*, 134 S. Ct. 2077 (2014). However pernicious a statute that defines photo development chemicals as a weapon of mass destruction

may be, more pernicious still is a statute that defines nothing at all.

Moreover, shifting administrative determinations makes the delegation of criminalization intolerable. Administrative authority is, by design, exercised to varying degree from administration to administration. Every four or eight years, a new executive with a new mandate is elected by the people, and he brings new preferences to bear on the powers Congress has granted. *See Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 157 (2012) (cataloging the Labor Department's changing interpretations of the Fair Labor Standards Act). In the context of the economy or the environment, those shifting standards might be tolerable—the voters may rightly pass judgment on the wisdom of this or that regulation, and their chosen representatives may respond to their preference. But the maintenance of a regime of criminal liability should not be subject to such transient caprice.

The previous attorney general determined that Gundy should be required to register—and for this failure Gundy stands convicted. If the next attorney general thinks differently and changes the rule, the requirement no longer exists. Not based on any principle—for there is no principle that guides the attorney general's discretion—but only on the vagaries of administrative preference. We the people thus stand adjudged not by a defined standard of conduct passed by a bicameral legislature and signed by the president, but by a political and administrative weathervane.

Finally, all of this comes in the context of a criminal code that has expanded to the point where even the government no longer knows how many federal crimes exist. Gary Fields & John R. Emshwiller, *Many Failed*

Efforts to Count Nation's Federal Criminal Laws, Wall St. J., July 23, 2011, https://on.wsj.com/2oKFAiM. So numerous are such provisions, and so indeterminate many of their requirements, that each of us is, by the odds, a daily felon. *See* Harvey Silverglate, *Three Felonies A Day: How The Feds Target The Innocent* (2011). Dissatisfied with this already intolerable state of affairs, the government asks this Court to extend its authority even further. The Court should not help the government further expand criminal law.

CONCLUSION

For these reasons, and those stated by the Petitioner, the Court should reverse the decision below.

Respectfully submitted,

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